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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

GARY M. PETERS, Plaintiff and Appellant, v. FARMERS & MERCHANTS BANK OF LONG BEACH, et al., Defendants and Respondents.	E029849 (Super.Ct.No. 778654) O P I N I O N

APPEAL from the Superior Court of Orange County. Selim S. Franklin, Judge. (Retired Judge of the Mun. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Cayer, Kilstofte & Craton, Stephen R. Kilstofte and Curt R. Craton for Plaintiff and Appellant.

Law Offices of Michael Leight, Michael Leight and John Gloger for Defendants and Respondents.

Plaintiff and appellant Gary M. Peters appeals from the trial court's judgment in favor of defendants and respondents Farmers & Merchants Bank of Long Beach and

Farmers & Merchants Company of Long Beach (collectively referred to as defendants) and the trial court's prior order enforcing the contractual provision under which the parties waived the right to a jury trial. Plaintiff contends that: (1) the trial court's ruling that plaintiff had waived his right to a jury trial constituted an improper summary adjudication of defendants' 19th affirmative defense; (2) the contracts purporting to waive his right to a jury trial were unenforceable adhesion contracts; and (3) the trial court erroneously broadened the scope of the waiver clause from its limited context in the June 3, 1993, loan agreement to the other loan agreements that did not contain a waiver clause. We find no error and affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and his business partner borrowed over $8 million from defendants, in order to develop a condominium complex and 10,000 square feet of commercial property. Plaintiff filed an underlying complaint against defendants based on the allegations that: (1) defendants terminated plaintiff's only source of income, thereby ensuring his inability to pay back the loan, so that defendants could foreclose on his home; (2) defendants compelled plaintiff to involuntarily enter into numerous financial transactions based upon the threat of foreclosing on his home and his partnership property; (3) defendants breached the contract with plaintiff; and (4) defendants released collateral with equity of over

[1] At the outset, we note that plaintiff's request to augment the record on appeal was denied without prejudice on August 30, 2000 by the Court of Appeal, Fourth Appellate District, Division Three.

$750,000 to plaintiff's former business partner, and defendant has now recovered part of that loss by foreclosing against plaintiff's home.

On June 30, 1999, defendants filed a motion for an order determining that plaintiff had waived his right to a jury trial (pretrial motion). The pretrial motion alleged that plaintiff had signed a promissory note dated June 3, 1993, which contained the following provision:

"Lender and I hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or me against the other." Identical language was found in a document entitled "Change in Terms Agreement," dated January 31, 1996, and signed by plaintiff.

In his opposition, plaintiff claimed that the court should deny defendants' motion because the contracts which contained the waiver language were adhesion contracts. Plaintiff claimed that he entered into both agreements "under the threat of foreclosure" by defendants on his business and personal assets, including his home. Under these circumstances, plaintiff was not in a position to negotiate the terms of the contracts, but forced to accept them as drafted by defendants. Plaintiff also claimed that the language was "hidden in the verbose text" of the June 3, 1993 contract, under a section entitled, "Lender Rights." Plaintiff then argued that if the court found that he had waived his right to a jury trial, the waiver should only apply to the causes of action that specifically involved the two contracts at hand. Of the 14 causes of action alleged in the second amended complaint, only the first two involved the contracts with the waiver language. The other causes of

action were based on disputes concerning other agreements which did not themselves contain the waiver language.

The pretrial motion came on for hearing on August 24, 1999, and the trial court ruled that the matter would be tried to the court. The trial, which began on August 25, 1999, resulted in a judgment in favor of defendants on each of plaintiff's causes of action.

Plaintiff now appeals.

ANALYSIS

I. Plaintiff Waived His Right to Object to the Alleged Procedural Defect

Plaintiff contends that defendants' motion for an order determining that plaintiff had waived his right to a jury trial essentially constituted a motion for summary adjudication of defendants' 19th affirmative defense. The record does not contain any document identifying defendants' 19th affirmative defense; however, we will assume that the defense was that plaintiff had waived his right to a jury trial. Plaintiff argues that the trial court abused its discretion by granting defendants' pretrial motion, without having met the requirements of Code of Civil Procedure section 437c, which governs summary judgment motions. In his reply brief, plaintiff argues, conversely, that the trial court improperly heard the matter as a motion in limine, rather than one for summary judgment.

Defendants filed their pretrial motion requesting that the court determine that plaintiff had waived his right to a jury trial. Plaintiff filed an opposition to the motion, claiming that the contracts containing the waiver clauses were adhesion contracts, that the waiver language was hidden in the contracts, and that, if the waiver clauses were valid, they

applied only to two specific causes of action. Thus, plaintiff below opposed the *substance* of defendants' motion; he never objected to the motion *procedure*.

"[A]ppellants cannot raise claims at the appellate level as grounds for reversal if they did not bring them to the attention of the trial court."[2] Specifically, "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations.]' [Citation.] Failure to object to the ruling or proceeding is the most obvious type of implied waiver. [Citation.]"[3]

Here, plaintiff did not raise the issue of the applicability of Code of Civil Procedure section 437c to defendants' pretrial motion in the trial court. Similarly, plaintiff never raised the issue of the alleged improper use of motion in limine procedures until he filed his reply brief on appeal. He cannot raise these new claims at this late date. These arguments have been waived.

II. The Contractual Waiver of the Right to a Jury Trial Was Enforceable

In California, agreements under which parties waive the right to a jury trial are enforceable.[4] To be enforceable, "the waiver provision must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties."[5]

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[2] *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.
[3] *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.
[4] *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616, 1618.
[5] *Trizec Properties, Inc. v. Superior Court*, *supra*, 229 Cal.App.3d 1616, 1619.

Here, the waiver provision was apparent in the contract, and it is undisputed that the language is unambiguous and unequivocal. The question at issue is whether the contracts at hand were unenforceable adhesion contracts.

A. Standard of Review

"'Where the ruling that is the subject of appeal turns on the trial court's determination of disputed facts, the appropriate standard of review on appeal is "sufficiency of the evidence." Evidence is sufficient if there is "substantial" evidence to support the ruling. . . .' [Citation.] It is an oftrepeated rule that an order challenged on appeal 'is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is appellant's burden to affirmatively demonstrate error and, where the evidence is in conflict, [the appellate] court will not disturb the trial court's findings. [Citations.]' [Citation.]"[6]

B. The Jury Waiver Provisions Were Enforceable

An adhesion contract is defined as "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]"[7] Here, plaintiff has made no showing that defendants had superior bargaining strength. There is no apparent reason why plaintiff could not have negotiated the terms of the agreements, or why he could not have rejected the agreements and sought a loan elsewhere.

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[6] *Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 486.

[7] *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.

However, even assuming the contracts were adhesive, there is no reason why the jury trial waiver provision should not be enforced. "[A] contract of adhesion is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules . . . operate to render it otherwise."[8] "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' [Citations.]"[9]

Here, we cannot conclude that the waiver provision did not fall within plaintiff's reasonable expectations. "Among the factors which strongly affect the assessment whether the contract was within the reasonable expectation of the 'adhering' party are notice, and the extent to which the contract affects the public interest."[10] The jury trial waiver was clearly written in the contracts. Plaintiff claims that the language was "hidden" in the text of the contract. However, a review of these papers reveals that each of these documents

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[8] *Graham v. Scissor-Tail, Inc., supra,* 28 Cal.3d 807, 819-820, footnote omitted.
[9] *Graham v. Scissor-Tail, Inc., supra,* 28 Cal.3d 807, 820.
[10] *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1375-1376.

was only one page long[11] and the waiver clause was printed in the same size type as the rest of the text. The notice here was certainly adequate to make plaintiff aware that the parties were waiving their rights to a jury trial.

Plaintiff further claims that the "F&M representative presented [him] the agreements, did not review the terms and conditions of the agreements with [him] and [he] did not have an opportunity to consult counsel before signing them." However, there is no reason why plaintiff could not have read and understood the contracts, and particularly the jury trial waiver clauses. Plaintiff was an experienced real estate developer, who had been doing business amicably with defendants for eight to nine years. Moreover, "'[i]t is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.' [Citations.]"[12] There were no allegations of fraud, and the record establishes that plaintiff signed both documents, having "read and understood all of the provisions" of the agreements. We see no reason why plaintiff should not have been aware of the terms of the contracts that he signed.

Furthermore, there was no evidence of oppression. Plaintiff claims that he was in no position to bargain concerning the terms of either agreement. He also claims that the circumstances were oppressive, in that he was "forced to enter into additional agreements with [defendants] or fall victim to [defendants'] threat to [foreclose] on his business and

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[11] The document dated January 31, 1996, actually has a second page; however, the second page is merely the signature page. The entire text of the agreement is contained in the first page.

personal assets." Plaintiff characterizes the situation as if he only entered into the agreements because defendants threatened to foreclose on his home and business assets. However, the record establishes that plaintiff *asked* defendants for the loan. . Plaintiff wrote a letter to defendants, dated March 26, 1993, thanking them for their ongoing relationship of eight to nine years, and asking defendants to consider lending him further funds to "rearrange [his] financial position." Moreover, plaintiff was the party who offered to "put up [his] personal residence," as well as another building, as collateral for the loan. In his next letter to defendants, dated April 1, 1993, plaintiff stated: "My offer to F & M Bank still stands. I will pledge my house . . . ." The letter further states that "[i]n the event that Bob [Horne, plaintiff's former business partner] feels that I am uncooperative with him, and F & M Bank agrees, I will either adjust or *F & M Bank can foreclose on my house and all other assets*." (Italics added.) The first loan agreement at issue was signed by plaintiff, and was dated June 3, 1993. Thus, plaintiff wrote these letters to defendants just prior to them giving him the loan.

Therefore, even assuming the contracts were adhesive, there was no apparent surprise as to the terms or evidence of oppression. Thus, there is no reason why the jury trial waiver should not be enforced.

III. The Trial Court Properly Proceeded With a Court Trial on All Causes of Action

Plaintiff contends that, if the jury trial waiver was enforceable, only the first and second causes of action would fall within the purview of the waiver, because those were the

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[footnote continued from previous page]

12 *Allan v. Snow Summit, Inc.*, *supra*, 51 Cal.App.4th 1358, 1376.

only causes of action that were based on the June 3, 1993 agreement. Plaintiff asserts that " the unconscionability of the waiver clause [was shown in] the trial court's broadening of the waiver clause from its limited context in the June 3, 1993 loan agreement to all of the other loan agreements that did not contain the waiver clause."

Plaintiff's assertion is unsupported by any legal authority whatsoever. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]"[13]

Nonetheless, we find that the waiver clause was enforceable and applicable to all of the causes of action between the two parties. The waiver language was unambiguous and unequivocal.[14] The waiver clause stated: "Lender and I hereby waive the right to any jury trial in *any* action, proceeding, or counterclaim brought by either Lender or me against the other." (Italics added) Nothing in the express language of the waiver clause limits its effect solely to the June 3, 1993 or the January 31, 1996 agreements.

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[13] *People* v. *Stanley* (1995) 10 Cal.4th 764, 793.

[14] *Trizec Properties, Inc. v. Superior Court*, *supra*, 229 Cal.App.3d 1616, 1619.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

/s/ Ward
J.

We concur:

/s/ McKinster
Acting P. J.

/s/ Richli
J.